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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 542

HARRY MINKOFF AND BERNARD BORUCK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (II R. 27-32)[1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1951 (II R. 32-33). The petition for a writ of certiorari was filed on February

[1] The record is in two volumes. The first volume, containing 532 pages, will be referred to as "R."; the second volume, of 33 pages, as "II R."

8, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a prosecution for possessing goods stolen from interstate commerce, the evidence was sufficient to prove that the stolen goods were part of a shipment in interstate commerce.

2. Whether the evidence was sufficient to prove that petitioners had possession of the stolen goods within the meaning of the statute proscribing such possession.

3. Whether the voluntary and admittedly truthful statement, not in the nature of a confession, which petitioner Boruck gave to the Federal Bureau of Investigation, was inadmissible under the rule of *McNabb* v. *United States,* 318 U.S. 322.

4. Whether, in the circumstances of this case, it was error to deliver to the jury, at their request, and in the absence of objection, petitioner Boruck's entire statement to the F.B.I., including a paragraph which, allegedly, was not originally received in evidence.

5. Whether the trial court abused its discretion in ruling that, if the case were remanded by the Court of Appeals, it would not grant a new trial on the ground of newly discovered evidence in the nature of an alleged recantation by a government witness.

STATUTE INVOLVED

18 U.S.C. [1940 ed.] 409 (now 18 U.S.C. 659) provided in pertinent part at the time of the commission of the alleged offenses here involved (April 29, 1946):

> * * * Whoever shall * * * steal * * * from any [of certain designated types of places] * * * any goods or property moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, * * * or shall buy, receive, or have in his possession any such goods or property, knowing the same to have been * * * stolen * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

STATEMENT

In a two-count indictment (R. 6-8), filed December 22, 1948 (II R. 1), in the District Court for the Southern District of New York, petitioners, together with Vito Cordo, Pasquale Di Pinto, Arthur Lief, Max Boruck, and James Boruck, were charged with possessing goods stolen from interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. [1940 ed.] 409, *supra* (count 1), and with having conspired to receive and possess such goods, in violation of 18 U.S.C. [1940 ed.] 88 (count 2). Before trial Cordo, Di Pinto, and Lief changed their previous pleas of not guilty to guilty (II R. 1, 2), and subsequently became government witnesses. Following a trial by jury, petitioner Minkoff was found guilty on

both counts (R. 486), and was sentenced to five years' imprisonment on count 1 and to two years' imprisonment on count 2, the terms to run concurrently (R. 507). Petitioner Boruck was found guilty on count 1 and not guilty on count 2 (R. 486), and was sentenced to two years' imprisonment (R. 506-507). Max Boruck and James Boruck were found not guilty on both counts (R. 486). On appeal to the Court of Appeals for the Second Circuit, the convictions of petitioners were affirmed (II R. 32).

The evidence adduced by the Government may be summarized as follows:

A number of cartons and bales of textile piece goods, with the names of the consignors and the various consignees in New York City, were shipped from Maiden, North Carolina, and received at the Whisenant Transfer Company in New York City on April 26, 1946, to be delivered from there to the consignees to whom they were being shipped (R. 26-28, 32-34, 38-40, 50, 54-57, Gov. Ex. 1, at R. 516). When the shipment was checked against the freight bills, no shortages were noted upon the truck manifest (R. 33-34).

On Saturday afternoon, April 27, Cordo, Di Pinto, and Lief, a former Whisenant employee (R. 48-49), stole approximately twenty cartons of this shipment from the Whisenant warehouse, and loaded them on a truck which they had rented for the occasion. Di Pinto drove the truck to an open lot in Brooklyn across the street from Cordo's

home. (R. 62-68, 107-109, 145-148.) On Sunday morning, April 28, Cordo telephoned petitioner Minkoff that he had some "piece goods" for sale. Minkoff came to Cordo's house shortly after noon to discuss the matter. (R. 69-70, 89.) Pointing to the truck across the street, Cordo told Minkoff that he had a "load of hot goods" on the truck and that it had been "taken Saturday" (R. 71). Cordo stated that he had no place to put the goods and told Minkoff that "if he wanted it, I would bring it down to him wherever he wanted" (R. 71). When asked if he was interested in the goods, Minkoff replied, "Yes" (R. 93). Minkoff, without examining the goods, directed Cordo to send the truck on Monday morning to a garage at 17th Street and 10th Avenue in New York City, where the two would meet (R. 71, 93-94).

A partnership consisting of petitioner Bernard Boruck, his brother James, and his father Max were the owners of this garage, operating under the name of Authority Trucking Company (R. 177-178, 249, 285). Minkoff had rented a small area in this garage for the purpose of storing materials used in his fertilizer business, and also paid the Borucks for the privilege of using their telephone (R. 181-182, 232, 320). In accordance with Minkoff's instructions, Cordo arranged for Di Pinto to drive the truck to the garage and take one Varelli with him on Monday morning, April 29 (R. 71-72, 95, 110). Cordo, on arriving at the garage that morning, told petitioner Bernard

Boruck and his brother James: "I got a load of hot goods and Harry [Minkoff] told me to bring it down here this morning * * * I want to get it unloaded fast because I want to get rid of the truck" (R. 72-73, 96-97). According to Cordo's testimony, he, Varelli, and the two Boruck brothers began to unload the goods onto a platform near a door leading into an adjoining building. However, Max Boruck refused to permit the goods to remain in the garage because a burglary of some radios and liquor had occurred there the night before, and he was awaiting the arrival of some detectives who were coming to make an investigation. (R. 73, 253-254.) Di Pinto argued with Max Boruck, remarking that the latter was "worried about a few cases of scotch and we had a $30,000 load of hot stuff" (R. 112, 131).

After Minkoff arrived at the garage and insisted that a storage place be found for the goods (R. 187, 200-202), petitioner Bernard Boruck stated they could be placed in an empty trailer on a 14th Street lot several blocks away[2] (R. 112-113, 187). Bernard Boruck, accompanied by his brother James, went to the lot to point out the trailer (R. 187).

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[2] This trailer was owned by the United Trucking Corporation, which kept its trucks on the 14th Street lot, but received its telephone messages at the Borucks' garage (R. 188, 259, 321-322). The Borucks knew that the trailer was on the lot and empty, because on the previous Friday night, the trucking company's driver, not wanting to leave certain liquor unattended on the lot over the weekend, got permission from the Borucks to leave it in their garage (R. 189, 254, 321).

After Di Pinto and Varelli took the loaded truck to the lot, they stood on the tailboard of the truck and passed the cartons to the Boruck brothers, who were inside the trailer. According to Di Pinto, the Boruck brothers, at one point in the unloading process, "ripped a couple of corners off a couple of the cartons." (R. 113-114, 137.)

After the truck left the garage, Minkoff told Cordo that "he first wanted to look at the material to see what it was, and then he would give [him] a price." While Cordo remained at the garage, Max Boruck and Minkoff went to the trailer, and, when they returned, "they had one roll of piece goods with them." Minkoff offered Cordo $3,000 for the load, but the latter demanded $5,000. (R. 75.) When no agreement could be reached, Cordo said, "All right, I am taking the truck, I am going to pick it up," to which Minkoff replied, "You can't pick it up now, not with all this excitement going on. You will have to pick it up tomorrow" (R. 75-76).

Soon after the above-described negotiations ended, Minkoff said to Bernard Boruck, "Bernie, has the truck a lock on it?" to which Bernard answered, "No, it has no lock." Minkoff then remarked, "There's piece goods in there." (R. 195.) However, Bernard took no steps towards procuring a lock for the goods, which consequently remained in the unlocked trailer until they were

later removed and sold to one Smolin (R. 76, 114).

The defendants' testimony contradicted portions of this evidence, although the theft and subsequent disposition of the goods were admitted.

ARGUMENT

1. While conceding that Cordo, Di Pinto, and Lief stole a quantity of goods from the Whisenant terminal, petitioners argue that there is no proof that what they took was part of a particular shipment which the evidence showed was in interstate commerce (Pet. 20-22). A similar argument was cogently rejected in *United States* v. *Smolin*, 182 F. 2d 783, 785 (C.A. 2), which involved the sale of the same stolen goods that are here involved, and what was said there applies with equal force in the instant case.

There was no shortage of goods on the truck manifest (Gov. Ex. 1, R. 516) showing the interstate shipment from Maiden, North Carolina, to New York City, and the receipt of the shipment on April 26 was noted on the truck manifest (R. 33-34). Some 23 cartons were missing from the terminal when George Leeds, the general traffic manager of the Whisenant warehouse, checked the goods on Monday, April 29 (R. 51-52, 59). Leeds, on the previous Saturday afternoon, had seen the markings on the cartons later found missing, including the marks of the North Carolina consignors and the names and addresses of the New York City consignees to whom the goods were to be

delivered (R. 56, 57). He knew "exactly what was missing" when making his check on Monday morning because he had the originals of Government Exhibits 2-7, which were attached to the claims sent to the insurance company after the consignees presented claims for their lost goods (R. 57-58). Further, the amount and weights of the merchandise missing and the estimates given by the thieves approximately corresponded. Cordo testified that 20 to 22 cartons had been stolen (R. 66); Di Pinto, 19 or 20 cartons (R. 109); and Lief, 17 or 20 cartons (R. 147). From the truck manifest and freight bills it appeared that most of the stolen cartons weighed approximately 200 pounds or more (R. 38-40; Gov. Ex. 1, R. 516). Cordo testified the weights were "200, 250, 350, 400" pounds (R. 87). The jury were clearly justified in inferring from this evidence that the piece goods stolen from the terminal were the same as those which petitioner Minkoff was interested in purchasing. Cf. *United States* v. *De Normand,* 149 F. 2d 622, 625 (C. A. 2), certiorari denied, 326 U.S. 756; *Bloch* v. *United States,* 261 Fed. 321, 324-325 (C.A. 5), certiorari denied, 253 U.S. 484.

2. There is no merit in petitioners' contention that the evidence is insufficient to prove that either of them had possession of the stolen goods within the meaning of 18 U.S.C. [1940 ed.] 409, *supra,* p. 3 (Pet. 25-29). In response to a juror's question as to "whether or not directing the goods is

possession," the trial court properly instructed (R. 479):

> I think I can answer your question this way: by saying that the possession contemplated by the statute does not necessarily mean having the so-called bird in the hand. Constructive possession is sufficient, that is, if the defendants had dominion or control over the goods in question. That is the legal notion of possession, the possession contemplated by the statute in this case.

None of the cases relied upon by petitioners (see Pet. 26-27) involves the statute here in question. The decisions are clearly distinguishable, and most of the language cited is dictum. *Grantello* v. *United States,* 3 F. 2d 117 (C.A. 8), *Toney* v. *United States,* 67 F. 2d 573 (C.A. D.C.), and *Patrilo* v. *United States,* 7 F. 2d 804 (C.A. 8), were concerned primarily with the accused's lack of control over the premises upon which contraband was found. In *United States* v. *Curzio,* 170 F. 2d 354, 357 (C.A. 3), the court recognized that if the jury had been properly instructed, there was sufficient circumstantial evidence for them to have inferred that the defendant had possession of the ration stamps. In *Colbaugh* v. *United States,* 15 F. 2d 929, 930 (C.A. 8), "defendant was not seen in manual possession of any whiskey at any time, nor was any found on his person when arrested, or in the automobile in which defendant and Cope

[his friend who had the whiskey] had driven to this place."

It was not necessary that petitioners take manual possession of the stolen goods; their constructive possession, as enunciated in the court's charge, was sufficient for their conviction. Cf. *Le Fanti* v. *United States,* 259 Fed. 460 (C.A. 3); *United States* v. *De Normand, supra,* 149 F. 2d at 624. The evidence here adduced was clearly sufficient to show that petitioners had at least constructive possession of the stolen property here involved. The Borucks were storing the loot under directions from their tenant Minkoff (R. 200-202, 205). When Minkoff failed to agree upon a deal with Cordo for the purchase of the goods, he cautioned the thieves against moving them until the following day (R. 76). Minkoff was concerned about the safety of the loot before it would be moved, since he asked petitioner Boruck if the truck had a lock on it (R. 195). Though the latter knew that the goods were "hot" and that Cordo wanted to get them "unloaded fast" (R. 72-73, 96-97), he assisted in partially unloading them at his garage (R. 73). Moreover, because his father refused to store the loot on the garage premises (R. 73), petitioner Boruck, in accordance with Minkoff's request, consented to the use of the trailer and helped to load the goods on it (R. 113-114, 137, 187, 200-202). As the court below correctly observed, "Since the trailer was provided for that

purpose [storing the stolen goods for Minkoff], the situation is no different for the purposes of this appeal than it would be if a part of the garage had been so used" (II R. 30). So long as the stolen goods were in the trailer, both petitioners had constructive possession, for they had the power either to move them or to prevent their removal.

3. Petitioner Boruck contends (Pet. 29-34) that the introduction in evidence of the statement he gave to the F.B.I. (Gov. Ex. 12, R. 522-524) was in violation of the rule of *McNabb* v. *United States*, 318 U.S. 322, because the statement was given "after seven hours of interrogation, without prior arraignment and without benefit of counsel or advice that he was entitled to counsel" (Pet. 29). The contention is without merit. He points to nothing in the record—and there is nothing—which indicates that he had not been arraigned when he gave the statement in question, or that he was without counsel and had not been advised of his right to counsel at the time. Indeed, the sole evidence in the record as to the duration of the interrogation which preceded the giving of the statement is the following fragmentary utterance made by him, in the course of his cross-examination, while he was attempting to reconcile portions of his direct testimony at the trial with parts of the statement: "Sure. After all when you are questioned for seven hours—" (R. 205). It is on this, his own exclamatory, non-declaratory remark

alone, in the entire record, that he relies in his attempt to inject a *McNabb* issue into this case.

The fact is that the statement in question was received in evidence at the trial without objection, either before or after verdict. There not only was no hearing in the trial court as to whether this statement might have been inadmissible under the *McNabb* rule; there was no contention, or even suggestion, that it might have been. The *McNabb* issue was sought to be injected into this case for the first time on appeal, with no more foundation for the claim of inadmissibility than the fragmentary exclamation of petitioner Boruck on cross-examination above referred to. Furthermore, Boruck conceded at the trial that he read the statement before signing it (R. 205, 220), that it was entirely voluntary (R. 205, 228, 229) and, further, that it was entirely true (R. 199, 200, 201-205, 229, 231). It should be noted, too, as a reading of the statement shows (R. 522-524), that it was generally *exculpatory* rather than incriminating in tone (though it contains various statements from which, when considered in conjunction with independent evidence, the jury could infer guilty knowledge on Boruck's part), and that Boruck intended it to be exculpatory. And it is evident from Boruck's testimony at the trial that he still considered it exculpatory at that time (see R. 229, 231).

In the light of all the foregoing facts, it is plain, we submit, that there is no *McNabb* issue in this case.

4. Petitioner Boruck's contention (Pet. 34-36) that "it was error to send to the jury the whole of [his] statement, including a part thereof which had not been received in evidence and had not been read to the jury" (Pet. 34) is equally without merit.

The portion of the statement to which reference is made (see R. 508-511) is the fourth paragraph from the end, which reads: "I was under the impression that the piece goods were black market. This was because I knew Minkoff was dealing in black market stuff. Many nights driving home with my father, Jimmie and I told my father that he should get rid of Minkoff. However, my father felt that we needed the sixty dollars rent that we got from Minkoff. Minkoff also helped pay for the phone" (R. 523-524).

After Boruck's statement had been identified by the F.B.I. agents who took it (R. 161-165), the record indicates that the prosecutor, with leave of the court, "read Government's Exhibit 12 in evidence [Boruck's statement] to the jury" (R. 166). So far as appears from that page of the record, the entire document was read at that time. There is some indication, it is true, from certain remarks of Boruck's counsel, made in the course of a colloquy concerning his application for bail pending appeal (see R. 508-511), that the prosecutor omitted the above-quoted paragraph of the statement when he read it to the jury in connection with its admission as part of the Government's case in chief, apparently pursuant to an agree-

ment with Boruck's counsel. But whether the prosecutor did or did not read the paragraph in question at that time is of no present importance for the following reasons:

While Boruck was testifying on his own behalf, he gave testimony which conflicted with many of the statements contained in his statement to the F.B.I. (see, e.g., R. 201-205), including those contained in the paragraph in controversy (see R. 213-221). The prosecutor, accordingly, confronted Boruck with his prior contradictory statements (R. 201-205, 217-221), reading to him, *verbatim,* the statements (among others) contained in the paragraph here in question (R. 217-221). At the request of counsel for petitioner Minkoff (Mr. Levine), the trial judge instructed the jury that Boruck's prior statements, including those made in the paragraph now challenged, were binding on Boruck alone and solely on the question of his credibility (R. 217-219). Counsel for Boruck (Mr. Delaney) made no objection whatever to the confrontation of his client with his prior statements.

After the jury had retired to consider verdicts, they asked the judge for "the statements of the Boruck family made to the F.B.I. (R. 480). The statements requested, including that of petitioner Boruck, were delivered to the jury (R. 483). Counsel for Boruck, contrary to Boruck's present assertion (Pet. 36), made no objections to the jury's receipt, *in toto,* of his client's statement (R. 483). This being the posture of the case, it is clearly im-

material whether or not the particular paragraph of Boruck's statement whose admission he now challenges was originally intended to be introduced as part of the whole statement, or whether or not it was originally read to the jury. For the paragraph in question later became relevant on a different issue, *viz.*, Boruck's credibility as a witness on his own behalf, and was read to the jury, without objection, with appropriate instructions that it was being received for that limited purpose.

5. Neither is there any merit in petitioner Minkoff's contention that he was entitled to a new trial on the ground of newly discovered evidence in the nature of an alleged recantation by Cordo of his testimony that he told Minkoff that the goods were stolen (Pet. 37-41).[3] At the instant trial, Cordo testified that he told Minkoff that he had a "load of hot goods" (R. 71) and that "we just stole a load Saturday" (R. 93). Some days later, in the case of *United States* v. *Smolin*, tried in the same court while the instant cases were pending on appeal, and involving the same stolen goods, Cordo was asked, "You did not tell him [Minkoff], for example, it was stolen goods?" to which he was reported as answering, "No, sir" (II R. 12). Asserting that this was a recantation by Cordo, both petitioners joined in a motion in the District Court (see II R. 8-15) asking for an order indicating that if the instant cases were remanded by

[3] Petitioner Boruck also apparently seeks to take advantage of the alleged recantation by Cordo (Pet. 37), but on what theory he does not make clear.

the Court of Appeals, the District Court would grant new trials on the ground of newly discovered evidence, in accordance with Rule 33, F. R. Crim. P. The motion was denied (II R. 21-22).

We think the court below was clearly right in deciding (II R. 31-32) that there had in fact been no recantation by Cordo and that the trial court had not, consequently, abused its discretion in denying the motion. Cf. *United States* v. *Johnson,* 327 U.S. 106. In an affidavit by Cordo executed subsequently to his alleged recantation, and filed by the Government in opposition to the motion for a new trial (II R. 18-20), Cordo stated that either the transcript in the *Smolin* case was wrong or that he misinterpreted the question as to whether he told Minkoff the goods were stolen (II R. 19). He pointed out that in the remainder of his testimony in the *Smolin* case he "continuously testified that I told everyone to whom I was to sell the stolen merchandise that the goods that I had for sale were 'stolen' or 'hot'" (*ibid.*). And he "again reaffirm[ed] that at all times when dealing with Harry Minkoff with respect to the merchandise that I attempted to sell him, I told him that the merchandise was 'stolen' and 'hot'" (II R. 20). It is clear, we submit, in the light of these facts, that both courts below were warranted in concluding that there had been no recantation in fact, and hence no justification for a new trial.[4]

[4] Petitioner Minkoff also contends that his conviction on the conspiracy count was improper because of an alleged insufficiency of proof that he knew the goods in question were

CONCLUSION

The judgment below is correct, and no conflict of decisions or question warranting further review by this Court is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1951.

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part of an interstate shipment when they were stolen (Pet. 22-25). And it is further contended in the petition for certiorari that the trial judge erred in charging the jury they could find "petitioners" guilty of the conspiracy charged if they found that any one of the alleged overt acts had been proved, the alleged error lying in the fact that some of the overt acts alleged related to the thieves' conspiracy to steal the goods, with which conspiracy they were not connected (Pet. 36-37). It is evident that the latter contention is also advanced on behalf of Minkoff alone, since petitioner Boruck was not convicted on the conspiracy count (R. 486). We do not agree that the evidence of Minkoff's knowledge of the interstate character of the goods was deficient (assuming the relevancy of such evidence), or that the judge's charge was faulty in the respect mentioned. But there is no need to consider either contention, since even if Minkoff's conviction on the conspiracy count were reversible, it would make no difference in this case, his two-year sentence on that count having been directed to run concurrently with his five-year sentence on the substantive count (R. 507). *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

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CHARLES ELMORE

IN THE

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October Term, 1950

No. 542

HARRY MINKOFF and BERNARD BORUCK,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

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